COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 052738-93 046205-96**
Judith Fallon	Employee
Department of Revenue	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy & Carroll)

APPEARANCES
Alan S. Pierce, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

COSTIGAN, J. The self-insurer appeals from a decision in which an administrative judge awarded, *inter alia*, § 35 partial incapacity benefits not claimed by the employee.[1] "The scope of the administrative judge's authority at a § 11 hearing is limited to deciding those issues in controversy." Hall v. Boston Park Plaza Hotel, 12 Mass. Workers' Comp. Rep. 188, 190 (1998). See also Goodsell v. Nashoba Painters, Inc., 16 Mass. Workers' Comp. Rep. 104 (2002); Lemieux v. FLEXcon Co., 15 Mass. Workers' Comp. Rep. 310, 311 (2001). "Where there is no claim, and therefore, no dispute, . . . the judge strayed from the parameters of the case and erred [by] making findings on issues not properly

[1] The parties stipulated that the employee sustained work-related back injuries in 1993 and 1996. (Dec. 691.) Based on the earlier date of injury, the employee claimed § 34 total incapacity benefits from November 20, 1996 to the date of statutory maximum entitlement. In the alternative, based on the second date of injury, she claimed § 34 benefits from August 12, 1997 through August 8, 2000. (Dec. 690.) Thus, the latest date on which the employee claimed any incapacity was August 8, 2000. It is well-established that a judge, faced with a claim for § 34 incapacity benefits only, may award "lesser included" § 35 benefits for the same period, Tredo v. City of Springfield, 19 Mass. Workers' Comp. Rep. ___ (May 20, 2005), citing Devaney v. Webster Eng'g, 14 Mass. Workers' Comp. Rep. 359, 361 (2000) and Fragale v. MCF Indus., 9 Mass. Workers' Comp. Rep. 168, 171-172 (1995). However, he may not award benefits for a period in which no incapacity is alleged -- in this case, from and after August 9, 2000.

before [him]." Casey v. Town of Brookline, 17 Mass. Workers' Comp. Rep. 302, 309 (2003), citing Medley v. E. F. Hausermann Co., 14 Mass. Workers' Comp. Rep. 327, 330 (2000), quoting Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 102-103 (1994).

The parties agree that the award of benefits not claimed is contrary to law. "Not wanting to stand in the way of such a meeting of the minds, we add our voice to the consensus. . . ." Leary v. M.B.T.A., 19 Mass. Workers' Comp. Rep. 66 (2005), quoting Beverly v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 621, 622 (2003). Accordingly, we reverse so much of the decision as finds the employee was partially disabled from August 9, 2000 to November 17, 2003, and we vacate the award of § 35 benefits for that period.

We summarily affirm the decision as to all other issues argued by the self-insurer. Pursuant to § 13A(6), the self-insurer is ordered to pay employee's counsel a fee of $1,357.64.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: **October 21, 2005**